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No. 20554 ✓

United States
COURT OF APPEALS
for the Ninth Circuit

JOEL C. HERTSCHE, JR., Executor of the Estate
of Joel C. Hertsche, Deceased, and JOEL C.
HERTSCHKE, JR., Transferee of the assets
of the Estate of Joel C. Hertsche, Deceased,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

*On Appeal From the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLANTS

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	3
Statutes and Regulations Involved	3
Statement	3
Specification of Error	4
Summary of Argument	5
Argument	6
I. Introduction	6
II. The 5,000 shares distributed within one year after the decedent's death should be valued as of the date of distribution	8
III. A treasury regulation which arbitrarily at- tempts to enlarge the scope of a statute is in- valid	20
Conclusion	25
Appendix	27

CITATIONS

Page

CASES

Bond, Estate of v. Commissioner, 326 F.2d 999 (Ct. Cl. 1964)	17
Busey v. Dreshler Hotel Co., 130 F.2d 187 (6th Cir. 1942)	23
Cammarano v. United States, 358 U.S. 498 (1959)	21
Commissioner v. South Texas Lumber Co., 333 U.S. 496 (1948)	21
Critchfield, Estate of v. Commissioner, 32 T.C. 844 (1959)	19
Donnelly, Estate of v. Commissioner, 31 B.T.A. 577 (1934)	18
Evans v. Commissioner, 264 F.2d 502 (9th Cir. 1959), rev'd on other grounds, 364 U.S. 92 (1960)	15
Fawcus Machine Co. v. United States, 282 U.S. 375 (1931)	21
Fisher Flouring Mills v. United States, 270 F.2d 27 (9th Cir. 1959)	23
Grange Insurance Ass'n of California v. Commissioner, 317 F.2d 222 (9th Cir. 1963)	15
Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110 (1939)	21
Hertsche, Estate of v. United States, 244 F. Supp. 347 (D.C. Or. 1965)	1
Iselin v. United States, 270 U.S. 245 (1925)	23
Kuldell v. Commissioner, 69 F.2d 739 (5th Cir. 1934)	18
Maass v. Higgins, 312 U.S. 443 (1941)	24
Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936)	22
Manhattan General Equipment Co. v. Commissioner,	

CITATIONS (Cont.)

	Page
Mason v. Routzahn, 274 U.S. 175 (1927)	16
Mitchell v. Commissioner, 300 F.2d 533 (4th Cir. 1962)	22
United States v. Rothenberg, 350 F.2d 319 (10th Cir. 1965)	22
United States v. Calamaro, 354 U.S. 351 (1957)	22
Woolford Realty Co. v. Rose, 286 U.S. 319, 327 (1931)	15
Woolley v. Malley, 30 F.2d 73 (1st Cir. 1929)	18

STATUTES

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):	
Section 317	16
Section 661	17
Section 662	17
Section 2031	6
Section 2032	3, 5, 6, 8
Section 2056	19
Section 4321	14
Section 6532	2
Section 7701	16
Section 7805	21
Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):	
Section 162	17
28 United States Code:	
Section 1291	2
Section 1346(a)	2
Excise Tax Reduction Act of 1965, P.L. 89-44, § 401	
(a)	14
Revenue Act of 1942, c. 619, 56 Stat. 798	17
Revenue Act of 1935, c. 829, 49 Stat. 1014	8
Oregon Revised Statutes § 117.350	12

CITATIONS (Cont.)

Page

MISCELLANEOUS

Rogovin, The Four R's: Regulations, Rulings, Reliance, Retroactivity, 43 Taxes 756, 760 (1965)	21
H. Rep. No. 1681, 74th Cong., 1st Sess. 1939-1 (Part 2) Cum. Bull. 642	9
H. Rep. No. 1885, 74th Cong., 1st Sess., 1939-1 (Part 2) Cum. Bull. 660	9
S. Rep. No. 1240, 74th Cong., 1st Sess., 1939-1 (Part 2) Cum. Bull. 651	9
Treasury Regulations on Estate Tax (1954 Code): Sec. 20.2032-1 (26 C.F.R., Sec. 20.2032-1) 5, 7, 11, 13, 15, 20, 23, 24	
Treasury Regulations 80 (1937 ed.): Article 11	24
Revenue Procedure 64-19, 1964-1 Cum. Bull. (Part 1) 682	19
C.C.H. Excise Tax Reporter Transfer Binder (1959-1960): Paragraph 6388	14
Paragraph 6389	14

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court (R. 36) is reported
at 244 F. Supp. 347.

JURISDICTION

This appeal involves federal estate taxes assessed
against the estate of Joel C. Hertsche, deceased, and col-

lected from the appellants by the District Director of Internal Revenue for the District of Oregon (R. 1-2).

A timely federal estate tax return for the estate was filed with the District Director on June 26, 1961 (R. 2). The return was subsequently examined by a representative of the District Director, and, in October, 1963, the executor of the estate received a memorandum of proposed adjustments from the examiner asserting that additional estate taxes were due (R. 3). On or about October 10, 1963, the appellants paid the asserted estate tax deficiency together with interest thereon (R. 3-4).

On January 15, 1964, the appellants filed a claim for refund of the estate taxes and interest paid by them pursuant to the memorandum of proposed adjustments, and for an additional refund of estate taxes previously paid based upon the prospective additional allowable deduction for attorneys' fees and other expenses incurred in prosecuting the claim for refund (R. 4). Under date of June 16, 1964, the appellants received a statutory notice of disallowance in respect to their claim (R. 4).

Within the time provided by Section 6532 of the Internal Revenue Code of 1954, and on July 2, 1964, the appellants brought an action in the United States District Court for the District of Oregon for the recovery of the disputed taxes paid (R. 54). Jurisdiction existed in the District Court under 28 U.S.C., Section 1346(a)(1). Judgment was entered on July 26, 1965 (R. 46). Within 60 days, and on September 22, 1965, the appellants filed their Notice of Appeal (R. 47). Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the proper date for determining the value of 5,000 shares of stock in National Lead Co., for inclusion in the decedent's gross estate under the alternate valuation provision contained in Section 2032 of the Internal Revenue Code of 1954, is October 25, 1960, the date distribution of the stock from the estate was actually made, or, is October 14, 1960, the date an order authorizing an advance and partial distribution of legacies was entered by the Probate Court.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954, and the applicable Treasury Regulations issued thereunder, are set forth in the Appendix, *infra*.

STATEMENT

All material facts were stipulated by the parties and are set forth in the Pretrial Order entered by the District Court (R. 1-6). Exhibits A, B and C were attached to the Pretrial Order and admitted when the Order was filed (R. 7-35). The agreed facts are as follows:

The decedent, Joel C. Hertsche, died testate on March 25, 1960, and shortly thereafter his will was admitted to probate in the Circuit Court of the State of Oregon for the County of Multnomah (R. 2). At the date of his death the decedent was the owner of 7,400 shares of the common stock of National Lead Co. (R. 2).

On October 14, 1960, an "Order for Advance and Partial Distribution of Legacies" was entered by the probate department of the aforesaid court authorizing the executor to distribute certain specific legacies and 5,000 shares of National Lead Co. common stock to the persons entitled to receive said distributions (R. 3). On October 25, 1960, the executor, pursuant to the order, distributed the stock to the residuary legatees under the will by transfer and physical delivery (R. 3). When actual distribution was made the executor was relieved of his fiduciary liability in respect to the stock (R. 3).

The stock was valued on the decedent's estate tax return for inclusion in the gross estate at \$79.6875 per share, the mean of its high and low selling prices on October 25, 1960 (R. 3). Upon audit of the return, a deficiency in tax was proposed on the theory that the stock should have been valued at \$84.75 per share, its value on October 14, 1960, the date the order authorizing partial distribution was entered by the probate court (R. 3).

The lower court adopted the position of the Internal Revenue Service in its opinion filed June 4, 1965 (R. 36-40). Judgment was entered in favor of the appellants, however, by reason of the court's allowance of a deduction for the attorneys' fees expended in prosecuting the claim (R. 46).

SPECIFICATION OF ERROR

The District Court erred in holding and deciding that the proper date for valuing 5,000 shares of National Lead Co. common stock under the alternate valuation

provision contained in Section 2032 of the Internal Revenue Code of 1954 was October 14, 1960, the date the probate court entered an order authorizing distribution of the stock, rather than October 25, 1960, the date the stock was actually distributed by the estate.

SUMMARY OF ARGUMENT

Section 2032 of the Internal Revenue Code of 1954 provides, in part, that upon the executor's election, the assets includible in a decedent's gross estate may be valued for estate tax purposes as of the date they are distributed to the beneficiaries of the estate. We contend that this means the date of actual distribution, and not some other arbitrarily selected date preceding distribution. The word "distributed" is commonly used and creates no ambiguity. Moreover, it is used repeatedly in other sections of the Internal Revenue Code, wherein it has always been held to mean the actual physical transfer of property. Since the use of the word "distributed" is so commonplace and well understood, there is no need to amplify it by regulation. Moreover, Treasury Regulation 20.2032-1(c), although it purports to merely interpret the statute, actually does far more. It names several other dates wherein the decedent's assets will be *considered* distributed. Thus, by its own language, the regulation is admittedly engaging in more than mere interpretation. It is attempting to actually add words to the statute without authorization by Congress.

Although Treasury Regulations interpreting the internal revenue laws are entitled to great weight, they

should not always be accepted. If they appear to add words to the statute, or are unreasonable in light of the statutory language employed by Congress, and the legislative intent in adopting the statutory provision, they should be stricken by the courts.

ARGUMENT

I

Introduction

In computing the value of the gross estate for federal estate tax purposes, a decedent's assets are normally valued as of the date of his death. This is the long standing general rule provided by Section 2031(a) of the Internal Revenue Code of 1954. Since 1935, however, an alternate valuation provision has been in the tax law which is now contained in Section 2032 of the 1954 Code.

The appellant-executor properly elected to value the decedent's assets for inclusion in his gross estate in accordance with Section 2032. The portion thereof material to this suit is Section 2032(a)(1), *Appendix, infra.*, which provides, in part, that in the case of property distributed within one year after the decedent's death, such property shall be valued *as of the date of distribution*.

The only dispute between the parties involves the value to be ascribed to 5,000 shares of stock in National Lead Co. which the decedent owned at his death, but which were distributed to the residuary legatees under his will within the one year period following his death. The parties are in agreement that the stock was actually

distributed on October 25, 1960, at which time its value per share was \$79.6875. This is the date and value used in filing the decedent's estate tax return. The government, however, has taken the position that the date of distribution is not controlling despite the language of the statute, and contends that the proper valuation date is October 14, 1960, the date the probate court entered an "Order for Advance and Partial Distribution of Legacies." In support of its position, the government relies upon its own Treasury Regulation. Section 20.-2032-1(c)(2), *Appendix, infra.*, which purports to prescribe when property is *considered* distributed; namely, upon the first to occur of the following: (1) the entry of an order for distribution; (2) the segregation of the property from the estate so that it is unqualifiedly subject to the demands of the distributee; or (3) the actual paying over or delivery of the property to the distributee.

We contend that this regulation is invalid for the reason that it is an unwarranted extension of the statute, and that it was proper for the appellant-executor to value the 5,000 shares of National Lead Co. stock in accordance with the statute as passed by Congress. In the sections below we will point out why the actual date of distribution is the logical and proper alternate valuation date and discuss the courts' power in respect to the validity of treasury regulations.

**The 5,000 Shares Distributed Within One Year
After the Decedent's Death Should Be Valued
As of the Date of Distribution**

Perhaps the best reason why the distribution date is the proper alternate valuation date is that the statute says so in clear and unambiguous terms. This statute, presently Section 2032(a)(1) of the Internal Revenue Code of 1954, entered the tax law in 1935 as Section 202 of the Revenue Act of 1935, c. 829, 49 Stat. 1014. In respect to that portion of its language material to this case, it has never been substantively changed. It has always provided that if the alternate valuation method is elected, property distributed within one year after the decedent's death shall be valued *as of the date of distribution*. Neither Section 2032(a)(1) nor any of its predecessors have ever provided that the alternate valuation date should be some other date preceding distribution.

In addition to the plain meaning of the statute, our position is further supported by the intent of Congress in passing the alternate valuation provision. In 1935, due to the 1929 market crash, Congress became concerned with the problem of an estate being valued at a certain figure for tax purposes on the date of the decedent's death and then having its value plunge greatly during its administration with the result that it could be substantially confiscated for taxes. Originally, the House and Senate proposed a special deduction for the amount of shrinkage in the value of an estate between the date

of death and one year after death, or, if the assets were sold or exchanged in the interim, then on the date of sale or exchange. H. Rep. No. 1681, 74th Cong. 1st Sess., 1939-1 (Part 2) Cum. Bull. 642, 649; S. Rep. No. 1240, 74th Cong. 1st Sess., 1939-1 (Part 2) Cum. Bull. 651, 659. Nothing was mentioned at this point in regard to the valuation date to be used in the event assets were distributed to estate beneficiaries during the one year period following the decedent's death.

When the revenue bill reached the House and Senate conference committee, however, the proposed shrinkage deduction was changed to the alternate valuation provision. The change was explained in the report of the conferees as follows (H. Rep. No. 1885, 74th Cong. 1st Sess., 1939-1 (Part 2) Cum. Bull. 660, 663):

The [senate] amendment also allows an additional deduction, in computing the value of the net estate, of the net shrinkage in value of assets arising from the difference in the aggregate value of assets forming part of the decedent's gross estate on the date of death and the aggregate value of such assets one year thereafter, substituting the date of sale or exchange by the executor in the case of assets sold or exchanged during such 1-year period. In lieu of this provision, the conference action inserts a provision giving the executor an election with respect to the time as of which the property included in the gross estate is to be valued. Under existing law the valuation is made as of the date of death. If the executor exercises the election given him by the conference agreement, all the property included in the estate on the date of death is to be valued as of the date one year after the decedent's

death, except that the value (at the time of distribution, sale, exchange, or other disposition) of property distributed, sold, exchanged, or otherwise disposed of, is taken in lieu of its value as of one year after death. . . .

Following the explanation of the bill, the committee gave the following example of its operation:

A decedent dies owning real estate of the value of \$100,000, corporate stock of the value of \$60,000, bonds of the value of \$20,000, foreign government bonds maturing nine months after date of death of a face value of \$10,000, but of a value of \$9,550, and cash amounting to \$5,000. These values are as of the date of death. The gross estate at date of death amounted, therefore, to \$194,550.00. The decedent had debts of \$15,000 and the administration expenses were \$25,000, which debts and expenses were promptly paid by the executor. The value of the net estate as of date of death was, therefore (after taking off the specific exemption), \$114,550. Six months after the decedent's death the executor distributed the bonds to a legatee under the will, at which time they were worth \$18,000, and he sold all the corporate stock owned by the decedent for a fair market value of \$50,000 in order to raise cash to pay the debts and expenses. The foreign bonds were paid in full at maturity. During the first year after the decedent's death the value of his real estate appreciated \$5,000. The executor elects to take advantage of the new provision of the bill. The value will be arrived at in this way:

Assets:	Value.
Real estate (as of one year after death)	\$105,000
Corporate stock (as of date of sale)	50,000

Bonds (as of date of distribution)	18,000
Foreign bonds (as of date of disposition, i.e., maturity)	10,000
Cash	5,000
	<hr/>
Gross estate	188,000
Deduct:	
Debts	\$15,000
Administration expenses	25,000
Specific Exemption	40,000
	<hr/>
	80,000
	<hr/>
Net estate	\$108,000

In the above example it can be seen that the valuation date of the bonds presents a situation similar to the case at bar. The committee quite explicitly demonstrated that the correct alternate valuation date was the distribution date, and made no technical distinction between actual distribution, order for distribution, or segregation or separation of assets. Nor did the committee direct or even suggest that the Treasury should make such a distinction.

It seems clear from an examination of the statute and its legislative history that the drafters of the statute intended that the latest date to be used for alternate valuation should be either one year from the date of the decedent's death or whenever the property was removed from the administration of the estate, whichever occurred the earlier. This is recognized by Treasury Regulation 20.2032-1(c)(1), *supra*, which provides, in part, "The phrase 'distributed, sold, exchanged, or otherwise

disposed of' comprehends all possible ways by which property ceases to form a part of the gross estate."

We submit that in the case at bar the 5,000 shares of National Lead Co. stock did not cease to be a part of the decedent's gross estate merely upon entry of the "Order for Advance and Partial Distribution of Legacies". The order was applied for by the executor and entered by the probate court pursuant to Ore. Rev. Stat. 117.350, which provides:

117.350. *Application for distribution of share of realty or personalty.* At any time after the filing of the first semiannual account and the expiration of at least six months from the date of first publication of notice to creditors, and when all uncontested claims filed with the executor or administrator have been paid or are sufficiently secured by a mortgage, or otherwise, but the estate is not in a condition to be finally closed and distributed, the executor or administrator, any heir, devisee, legatee or beneficiary of any trust created by will may apply to the court, by petition, for an order *authorizing* the distribution of a legacy, devise or share of the estate, or of any portion or portions thereof, to the heir, legatee or devisee entitled thereto. (Emphasis supplied).

This provision of Oregon probate law sets forth a means whereby an estate can be partially distributed before a final order directing distribution is entered. It does not direct or require distribution but simply authorizes a partial distribution to be made by the executor. Thus, it is not self executing and its mere entry alone does not operate to divest the assets listed therein from the gross

estate.¹ It is quite different from the final order of distribution usually entered upon the executor's final accounting following which the estate is closed.

Since the drafters of the alternate valuation provision intended that any depreciation in value of the assets of the estate that occurred while they were being administered in probate should, at the election of the executor, be reflected in the valuation of the decedent's gross estate, the government's position set forth in Treasury Regulation 20.2032-1(c)(2) is unduly restrictive and is in conflict with the intent of Congress. We are unable to see any reason why estate assets should be deprived of the estate tax benefits conferred by the alternate valuation provision during the period between entry of the order authorizing distribution and the actual distribution itself. During this period the assets certainly remain part of the estate subject to its administration, and the claims of the heirs, legatees or devisees named in the order continue to be subordinate to claims of others of greater rank, such as creditors of the estate.

As a practical matter, it is possible that the interval between entry of the order and distribution could be substantial in length during which time the economic circumstances that prompted the enactment of the alternate valuation provision in the first place could very well occur.

It is interesting to note that the government would

¹ Although the order itself in our case appears to be broader than the partial distribution statute, it is clear the order was entered pursuant to that statute.

take a different position in respect to excise taxes resulting from the distribution of the National Lead Co. stock which are imposed by Section 4321 of the Internal Revenue Code of 1954.² In a special ruling dated December 23, 1958, found in CCH Excise Tax Reporter transfer binder (1959-60) at paragraph 6388, it is provided that:

The date the stock certificate is actually distributed and delivered to the legatee, or other proper person, is the time of transfer and the actual value as of that date is the basis for the tax.

This position was reaffirmed by the Internal Revenue Service in another special ruling dated July 30, 1959, which can be found in the source cited above at paragraph 6389. There it is stated that:

Where stock, the subject of a gift, is delivered by the donor to the donee . . . the day of such physical delivery to the donee is the day for determining the actual value. Likewise, if stock is delivered by an executor or administrator to a legatee, or other person entitled thereto, the day the stock is so delivered by the executor or administrator is the day for computing the actual value for the purpose of the transfer tax.

In our view, these rulings ascribe to the word "distributed" its commonly understood meaning. For this reason we are puzzled as to why the drafters of the estate tax regulations found it necessary to adopt the rather lengthy and involved regulation in question dealing

² Recently repealed by the Excise Tax Reduction Act of 1965, P. L. 89-44, Sec. 401(a).

with alternate valuation.³

We anticipate that the government may assert that the word "distributed" is so general that the adoption of Treasury Regulation 20.2032-1(c)(2), purporting to define the term, was a proper exercise of its interpretative function. *Evans v. Commissioner*, 264 F.2d 502 (9th Cir. 1959), *rev'd* on other grounds, 364 U.S. 92 (1960). Although we discuss this at greater length in the next section of our brief, we would like to point out here that the regulation in question does not merely attempt to interpret or define the term "distributed" which, if the Treasury had thought it necessary, could easily have been done.⁴ It attempts to prescribe that upon the occurrence of one of three possible events, only one of which can reasonably be construed to fall within the normal meaning of the word "distributed", distribution shall be *considered* to have taken place. This is certainly more than an attempt to interpret or clarify; it is an unwarranted attempt to legislate.

As noted above, the word "distributed" is a common one and creates no ambiguity. There is no reason why it should not be given its normal, ordinary meaning. *Grange Insurance Ass'n. of California v. Commissioner*, 317 F.2d 222 (9th Cir. 1963). In fact, "distributed" is one of the words most frequently used by the drafters of the Internal Revenue Code.⁵

³ The popular or received impact of words furnishes the general rule for the interpretation of public laws. *Woolford Realty Co. v. Rose*, 286 U.S. 319, 327 (1931).

⁴ As illustrated by the excise tax rulings, *supra*.

⁵ It was similarly used in the revenue statutes preceding the Internal Revenue Code of 1954.

In subchapters C and K of Chapter 1 of Subtitle A of the Code dealing with corporate distributions and adjustments and with partnerships, respectively, the term "distribution" is used in one form or another in nearly every section pertaining to the transfer of property from a corporation to its shareholders and from a partnership to its partners. Despite the repeated and important usage of the term, the drafters of the Code felt it unnecessary to define it even though they apparently were aware that certain words of art which they used needed definition. See, Sections 317 and 7701 of the 1954 Code. It is also of significance to note that apparently the Treasury did not deem it necessary to explicitly define the term by regulation when used in subchapters C and K. We submit that when the word "distributed" is used in these subchapters and their supporting regulations, it means nothing less than actual distribution. The Supreme Court so held in the early case of *Mason v. Routzahn*, 274 U.S. 175 (1927), wherein the government unsuccessfully asserted that the date a dividend was declared should be deemed the distribution date rather than the date of actual payment under a no longer existing statute wherein it was material to determine the date of distribution of a dividend to ascertain the tax rate applicable.

Subchapter J of Chapter 1 of Subtitle A of the Code pertaining to the income taxation of estates and trusts also contains many provisions using the word "distribution" or a derivative thereof. As in the case of subchapters C and K, it is clear that everywhere the term is used the physical act of distribution is what is meant.

Perhaps the best example of this point is contained in Section 661 of the 1954 Code. This section allows a deduction in computing the taxable income of an estate or complex trust for income received during the year which is required to be distributed currently and for any other amounts properly paid, credited or required to be distributed during the year.⁶ Questions have arisen under this provision in respect to an item which is not required to be distributed currently as to when a distribution occurred so it could be deemed an amount which has been properly paid or credited.

In *Estate of Bond v. United States*, 326 F.2d 999 (Ct. Cl. 1964), the executors of the estate filed an administration account containing a schedule of proposed distribution in 1951. In December of that year, the probate court entered an order finding the account true and directing distribution to the residuary distributee in accordance with the terms of the will. After several appeals which were eventually settled in a judgment, the estate was finally distributed by agreement on October 30, 1952. The executor claimed a deduction in computing the taxable income of the estate for 1951 for an amount paid or credited to a beneficiary under the 1939 Code predecessor of Section 661.⁷ His theory apparently was that the order entered in December, 1951, effected a distribution even though actual distribution did not take place until 1952. The Court of Claims held for the government on

⁶ The corresponding income provision in respect to the distributee is Section 662 of the Code.

⁷ Section 162(b) and (c) of the Internal Revenue Code of 1939, (26 U.S.C. 1952 ed. Sec. 162), as amended by Section 111 (b) and (c) of the Revenue Act of 1942, c. 619, 56 Stat. 798.

the ground that no amounts were paid, credited or required to be distributed until 1952, when actual distribution occurred. Although the decision in the case must be read in light of its facts, it is important to note that the court's opinion is bottomed on the fact that no actual distribution had taken place until 1952, nor had there been any enforceable order giving the legatees, heirs or beneficiaries a legal right to compel distribution.

Turning to the case at bar, it is interesting to speculate on what would have been the income tax consequences had National Lead Co. paid a dividend subsequent to the entry of the order authorizing partial distribution but before actual distribution was made, assuming actual distribution occurred in the next taxable year. It seems clear that the estate and not the distributee would have been taxed on the dividend in that event since the dividend income was not required to be distributed currently nor was it actually paid or credited. *Kuldall v. Commissioner*, 69 F.2d 739 (5th Cir. 1934); *Woolley v. Malley*, 30 F.2d 73 (1st Cir. 1929); *Estate of Donnelly*, 31 B.T.A. 577 (1934). Again, actual distribution is the focal point.

We fail to see any reason why the term "distributed" should be given a construction by regulation which is different from its treatment throughout the tax law generally and which is contrary to its commonly understood meaning. Although the Treasury probably thought it was promoting certainty by promulgating the regulation in question, we submit that uncertainty can, and often does, result from such action.

For example, in *Estate of Critchfield*, 32 T.C. 844 (1959), one of the questions before the Tax Court was whether certain stock should be included in the decedent's gross estate at the value on the optional valuation date or on the earlier date upon which the surviving spouse had elected, under local law, to purchase the stock from the estate. The optional valuation date was stipulated by the parties and found by the Court to be the date the stock was actually distributed or transferred to the surviving spouse and not the date on which the probate court entered an order approving the surviving spouse's election to purchase and directing the executor to convey the stock to her. Although the issue before this Court was not involved in *Critchfield*, the case demonstrates that confusion and inconsistency can be generated by an arbitrary regulation that appears to be without any real purpose.

In another context, we might pause to consider how the phrase "at the date of distribution" is to be interpreted in connection with the recently issued Revenue Procedure 64-19, 1964-1 Cum. Bull. (Part I) 682, which is of great importance in the state planning field. The ruling states the position of the Internal Revenue Service relative to allowance of the marital deduction⁸ in cases where there is some uncertainty as to the ultimate distribution to be made in payment of a pecuniary bequest or transfer in trust where the governing instrument provides that the executor or trustee may satisfy bequests in kind with assets at their value as finally determined for federal estate tax purposes. In

⁸ Section 2056 of the Internal Revenue Code of 1954.

nearly every section of the ruling a key date is the "date of distribution" which is not defined. Material differences can result depending upon whether the distribution date is considered to be when actual distribution occurs or when the order authorizing or directing distribution is entered. Although one would think actual distribution is what was meant by the Service, the existence of regulations such as Treasury Regulation 20.2032-1(c)(2) creates doubt and uncertainty.

III

A Treasury Regulation Which Arbitrarily Attempts To Enlarge the Scope of a Statute Is Invalid

Although we believe that our position is firmly supported by the statute, we recognize that we are confronted by a long standing Treasury Department regulation to the contrary.⁹ Clearly, this fact impresses the lower court (R. 38-39).

In most instances, we would admit that regulations drafted by the governmental agency charged with administration of the law should be treated with great respect. For example, had the regulation in question read like the excise tax rulings, discussed above, no valid objection could be made. If this had been the case, the regulation would simply have constituted a reasonable interpretation of a key word used in the statute. As such, it would have served a proper administrative function. We submit, however, that the regulation, as written, attempts to do far more, and goes beyond the Con-

⁹ Treasury Regulation 20.2032-1(c), *Appendix, infra*.

gressional authority granted the Treasury Department for the adoption of regulations.

The Treasury's regulation-making authority is derived from Section 7805(a) of the Internal Revenue Code of 1954, which allows it to prescribe all "needful rules and regulations" for the enforcement of the internal revenue laws. As a general proposition, regulations adopted under this authority are entitled to substantial weight.¹⁰ A number of rationales have developed in support of the weight normally given to the Treasury's interpretative regulations.

One of the most frequently mentioned principles is that of legislative reenactment—the theory being that Congress is aware of the Treasury's interpretative regulations and is tacitly approving of them when it reenacts a statute without change. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939); *Cammarano v. United States*, 358 U.S. 498 (1959). The lower court in the instant case cited this principle in its opinion (R. 39).

Another theory often used is that of contemporaneous construction. Under this doctrine, regulations issued contemporaneously with the enactment of a statute are presumed to represent the general understanding of the meaning of the statute and of legislative intent. *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496 (1948); *Fawcus Machine Co. v. United States*, 282 U.S. 375 (1931). This theory was also mentioned by the lower court (R. 39).

¹⁰ See, Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 Taxes 756, 760 (1965).

We submit that these principles, based upon unsupported assumptions of fact, are no substitute for careful scrutiny of a regulation in light of the language employed in the statute and the purpose for which it was enacted. This has been recognized by many courts. The Supreme Court in the early case of *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129 (1936), stated (p. 134):

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity.

More recently, in *United States v. Calamaro*, 354 U.S. 351 (1957), the Court held a wagering tax regulation invalid, stating (p. 358-359):

. . . In light of the above discussion, we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there. As such the regulation can furnish no sustenance to the statute.

Moreover, in *Mitchell v. Commissioner*, 300 F.2d 533 (4th Cir. 1962), a Treasury regulation was stricken despite an argument put forth by the government which included both the reenactment and the contemporaneous construction theories.¹¹

¹¹ The *Mitchell* decision was approved and followed by the Court of Appeals for the Tenth Circuit in *United States v. Rothenberg*, 350 F.2d 319 (1965).

Our point in respect to the validity of the Treasury's interpretative regulations is best summed up by the following language from the opinion in *Busey v. Deshler Hotel Co.*, 130 F.2d 187 (6th Cir. 1942) at p. 190:

To become binding, interpretative regulations must be reasonable and in furtherance of the intention of Congress, as evidenced by its Acts. An arbitrary regulation of the Commissioner of Internal Revenue is not enforceable. Where the language of a taxing statute is plain and unambiguous, there is no occasion for resort to interpretative promulgations of the Treasury Department. Neither the administrative officers nor the courts may supply omissions or enlarge the scope of the state. See *Iselin v. United States*, 270 U.S. 245, 250, 251, 46 S. Ct. 248, 70 L. Ed. 566.

This Court in *Fisher Flouring Mills Co. v. United States*, 270 F.2d 27 (9th Cir. 1959) put it as follows (p. 30):

. . . It seems clear that the Supreme Court has not abandoned the axiom that the legislative will must be ascertained from the text of the statute if the words are clear and plain and the whole enactment internally cohesive. . . . In virtue of legislative selectivity of objects of taxation, an act levying imposts should not be construed if unambiguous even by the use of adventitious aids ordinarily available.

As we have pointed out, Treasury Regulation 20.2032-1(c)(2) is not only out of harmony with Section 2032, it is out of harmony with the entire Code as well as other administrative rulings. Moreover, there appears to be no reasonable need for adopting the regu-

lation which patently enlarges the scope of the statute. Thus, we urge that the regulation is plainly invalid and should not be given the weight by this Court normally accorded to consistent, meaningful regulations which have been adopted to interpret or clarify a statutory provision which needs it.

We might further add that striking down a portion of the regulations promulgated under Section 2032 is not without precedent. Shortly after the adoption by Congress of the alternate valuation provision, the Treasury issued Article 11 of Regulation 80 (1937 ed.), the predecessor to Treasury Regulation 20.2032-1, part of which required inclusion in the gross estate of income earned during the year following the date of death when the alternate valuation date was elected. In *Maass v. Higgins*, 312 U.S. 443 (1941), this aspect of the regulation was held to be invalid, the Court stating (p. 447):

. . . the petitioners insist that the Government's position is unreal and artificial; that it does not comport either with economic theory or business practice; and that the regulation is an unwarranted extension of the plain meaning of the statute and cannot, therefore, be sustained. We hold that the petitioners are right.

We submit that the argument of the petitioners in *Maass* is equally applicable in the case at bar in respect to Treasury Regulation 20.2032-1(c)(2).

CONCLUSION

For the reasons set forth above, the decision of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that counsel for appellants have examined the provisions of Rules 18 and 19 of this Court and are of the opinion that this brief conforms to all requirements.

JOYLE C. DAHL

January, 1966

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 2032. ALTERNATE VALUATION.

(a) General.—The value of the gross estate may be determined if the executor so elects, by valuing all of the property included in the gross estate as follows:

(1) In the case of property distributed, sold, exchanged, or otherwise disposed of, within 1 year after the decedent's death such property shall be valued as of the date of distribution, sale, exchange, or other disposition.

(26 U.S.C. 1958 ed., Sec. 2032)

Treasury Regulations on Estate Tax (1954 Code):

Sec. 20.2032-1 Alternate valuation.

(a) *In general.* In general, section 2032 provides for the valuation of a decedent's gross estate at a date other than the date of the decedent's death. More specifically, if an executor elects the alternate valuation method under section 2032, the property included in the decedent's gross estate on the date of his death is valued as of whichever of the following dates is applicable:

(i) Any property distributed, sold, exchanged or otherwise disposed of within one year after the decedent's death is valued as of the date on which it is first distributed, sold, exchanged, or otherwise disposed of:

* * *

(c) *Meaning of "distributed, sold, exchanged, or otherwise disposed of."* (1) The phrase "distributed, sold, exchanged, or otherwise disposed of" comprehends all possible ways by which property ceases to form a part of the gross estate. For example, money on hand at the date of the decedent's death which is thereafter invested, falls within the term "otherwise disposed of." The term also includes the surrender of a stock certificate for corporate assets in complete or partial liquidation of a corporation pursuant to section 331. . . .

(2) Property may be "distributed" either by the executor, or by a trustee of property included in the gross estate under sections 2035 through 2038, or section 2041. Property is considered as "distributed" upon the first to occur of the following:

(i) The entry of an order or decree of distribution, if the order or decree subsequently becomes final;

(ii) The segregation or separation of the property from the estate or trust so that it becomes unqualifiedly subject to the demand or disposition of the distributee; or

(iii) The actual paying over or delivery of the property to the distributee.

(26 C.F.R. Sec. 20.2032-1)